

GLADWYNNE CONSTRUCTION
COMPANY

CONTRACT NO. V512(B)C-012

VABCA-6594, 6595,
6597, 6598

VA MEDICAL CENTER
BALTIMORE, MARYLAND

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OPINION BY ADMINISTRATIVE JUDGE KREMPASKY

These timely appeals arise out of Contract Number V512(B)C-012 (Contract) between the Appellant, Gladwynne Construction Company (GCC), and the Respondent, Department of Veterans Affairs (VA), for construction of a primary care clinic (Clinic), part of the Department of Veterans Affairs Maryland Health Care System. The Contract was awarded and administered by the Department of Veterans Affairs Medical Center in Baltimore, Maryland (VAMC Baltimore).

The appeal in VABCA-6594 is a claim for \$9,457 for additional costs resulting from an alleged change to the Contract involving the repair and installation of a streetlight electrical circuit. VABCA-6595 involves a \$121,271 claim for extended general conditions costs resulting from alleged VA delay of the Contract work. GCC claims interest expenses of \$14,475 allegedly incurred because of the VA's failure to properly pay for changes and project delay in VABCA-6597. VABCA-6598 is GCC's claim for payment of \$76,548, the

remaining amount of the Contract price withheld by the VA for completion of “punch list” items.

The Record before the Board consists of the Pleadings; an Appeal File (cited as “R4, tab __”) consisting of 42 exhibits; 47 exhibits introduced into evidence at the hearing by GCC, cited as “Exh. A-__”); 33 exhibits introduced into evidence at the hearing by the VA, cited as “Exh. G- __”; a joint exhibit stipulating facts, cited as (“Exh. J-1”, para. __) consisting of the parties’ 19 page JOINT STATEMENT OF STIPULATED AND CONTESTED FACTS in which Paragraphs 1, 2, 3, 5, 39-43, 45-48, 50-53, 56-59, 61-66, 69-70, 73-74, 76-84, 88-90, 92-93, 96-100, 104-105, 107, 112 and 114 are stipulations of fact; the *seriatim* MAIN, RESPONSE, and REPLY BRIEFS (cited as MAIN, RSPSE, or RPLY at ____); and, the 2 volume transcript of the hearing in this matter, held in Washington, DC (cited as “Tr. [vol. #]:__”).

FINDINGS OF FACT

General

GCC and the VA entered into the Contract on October 1, 1998. The Contract provided for construction of the approximately 9,600 square foot Clinic with a performance period of 300 days from the Notice To Proceed for a price of \$1,389,400. The VA issued the Notice To Proceed with work on the Clinic on October 19, 1998, making the Contract completion date August 15, 1999. Time extensions granted by supplemental agreements (SA) and Contract change

orders (CCO) extended the completion date to February 2, 2000. The VA accepted the Clinic as substantially complete on June 26, 2000. (R4, tab 1; Exhs. G-1, J-1; Tr. vol. I: 117-18)

Through various SAs and CCOs, the Contract price was increased to \$1,503,559.80. In September 2000, the VA, by CCO #3, unilaterally reduced the Contract price by \$94,463.25 with \$92,100 of that amount for uncompleted punch list work. (Exhs. J-1, A-34, 37)

The Contract includes the standard Federal Acquisition Regulation ("FAR"), 48 C.F.R. Chapter 1, and Department of Veterans Affairs Acquisition Regulation ("VAAR"), 48 C.F.R. Chapter 8, clauses usually found in VA construction contracts, including the following clauses relevant to these appeals:

COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK,
FAR 52.212-3 (APR 1984)
CHANGES, FAR 52.243-4 (AUG 1987)
CHANGES AND CHANGED CONDITIONS, FAR 52.243-5
(APR 1984)
CONTRACT CHANGES, VAAR 852.236-88(a) (JUN 1987)
CHANGES - SUPPLEMENT (FOR CHANGES COSTING \$500,000 OR
LESS), VAAR 852.236-88(b) (JUN 1987)
INSPECTION OF CONSTRUCTION, FAR 52.246-12 (JUL 1986)
INSPECTION OF CONSTRUCTION, VAAR 852.236-74 (APR 1984)
LIQUIDATED DAMAGES-CONSTRUCTION, FAR 52.211-12
(APR 1984)
LIQUIDATED DAMAGES-PARTIAL PERFORMANCE AND
ACCEPTANCE, VAAR 852.212-70 (APR 1984)
PAYMENT UNDER FIXED-PRICE CONSTRUCTION CONTRACTS
(WITHOUT NAS), VAAR 852.236-82 (APR 1984)
SCHEDULES FOR CONSTRUCTION CONTRACTS, FAR 52.236-15
(APR 1984)
SCHEDULE OF WORK PROGRESS, VAAR 852.236-84 (NOV 1984)
SPECIAL NOTES, VAAR 852.236-91 (JAN 1988)
SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION-
ALTERNATE I, FAR 52.236-21 (FEB 1997)

SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION, VAAR
852.236-71 (APR 1984)
SUSPENSION OF WORK, FAR 52.212-12 (APR 1984)

(R4, tab 1)

The contracting officer (CO), Andrea O'Connor, received the claims reflected in these appeals on September 19, 2000. (R4, tab 27; Tr. vol. I: 202)

VABCA-6594, Street Light Circuit

Included in the Contract work was restoration of street light circuits at the Clinic site. However, the actual condition of these circuits was significantly different from the condition depicted in the Contract documents. The circuits had been damaged in prior construction projects and apparently were not in the configuration expected. By Modification #2 to the Contract, the VA paid GCC an additional \$4,057 to repair one of the circuits. Subsequently, a second damaged circuit was discovered and the VA decided to install a new circuit instead of attempting a repair. In the course of the work, GCC had to perform investigational excavation as well as the trench excavation and installation of the new electrical conduit. (R4, tabs 1, 2, 9; Exh. A-39)

GCC installed the new circuit between March 1 and March 24, 2000. The VA recognized the work as a change to the Contract and requested a proposal from GCC for the cost of the work. On March 23, 2000, GCC submitted a proposal of \$9,457 to accomplish the circuit replacement. After several counter proposals were exchanged, the VA, by CCO #3, unilaterally established \$6,330.25 as the price for the work. That amount was allowed for the street light circuit work in the CO's final decision of November 17, 2000. (R4, tabs 9, 28; Exhs. A-37, 39)

The street light circuit work required GCC to utilize a leased backhoe. The VA recognized one week of the backhoe cost for the street light circuit work; GCC requested one month's backhoe rental as part of its proposed costs for installation of the new street light circuit. The daily logs reflect three days of actual use of the backhoe for the street light circuit installation; however, it is not clear that the daily logs accurately reflect all the days of backhoe use for the work. GCC rented the backhoe for a total of sixty days and used it on other Contract work in the same area as the street light circuit installation. (R4, tabs 3, 9; Tr. vol. I: 102-107)

GCC leased a backhoe by month and paid \$2,748 for four weeks (28 days) of backhoe rental; the VA allowed \$750 for backhoe rental in CCO #3. Thomas Behrle, GCC's president, testified that the work on the circuit at issue took place over a 24 day period in March 2000 and that it was not practical to engage the backhoe for the days it was actually used on the circuit because the nature of the work dictated the need to have the backhoe available during the entire period of the circuit installation. Mr. Behrle also represented that the sole issue with regard to the amount of the equitable adjustment was the VA's refusal to allow the entire amount of the 28-day rental of the backhoe as claimed by GCC. (R4, tab 9; Exh. A-39; Tr. vol. I: 66-69, 102-107)

VABCA-6595, Extended General Conditions

The Contract required installation of an insulated Exterior Insulation and Finish System (EIFS) on exterior vertical walls and the building soffit. EIFS is a faux stucco installation consisting of a foam insulating board with the general consistency of a foam plastic coffee cup to which two layers of cementitious material and a finish layer of stucco material are applied. As reflected in the EIFS

manufacturer's material submitted by GCC and the Contract specifications, the customary field installation of the EIFS system involves gluing the insulating board to a rigid substrate. The cementitious/stucco layers of the EIFS system are then applied to the insulating board. The substrate of the EIFS systems is usually plywood, gypsum board or other solid material. The gypsum board substrate utilized in an exterior EIFS application is similar to what is commonly known as wallboard used in an interior finish but specially constituted to make it resistant to moisture and appropriate for an exterior application. (R4, tabs 1, 2; Exh. G-30; Tr. vol. I: 35, 39; Tr. vol. II: 371, 419-23)

Although the representative of the VA's architect engineer (A/E) maintained that a nearly invisible line or miniscule space shown on the soffit detail in the Contract drawings depicts a gypsum board substrate, neither the Contract drawings nor specifications relating to the Clinic soffit indicate the existence of a substrate to be attached to the metal rafters at the soffit. The soffit is the underside of the overhang of the roof structure projecting over the Clinic's exterior wall. The Contract drawing details relating to the EIFS installation on the exterior walls of the Clinic clearly depict the EIFS insulating board attached to a gypsum board substrate. (R4, tabs 1,2; Tr. vol. I: 40-41, 72-73, 80-81, 143; Tr. vol. II: 366, 368, 381, 406, 420-24)

In an October 25, 1999 letter, Mr. Berhle of GCC forwarded a Request For Information (RFI) to the VA inquiring whether a substrate for the EIFS soffit installation was required. On April 1, 2000, the VA directed GCC to install exterior gypsum board at the soffit as the EIFS substrate. Between October 1999 and April 2000, the VA took various positions regarding the soffit substrate. These positions included the A/E's representation that the EIFS insulating board could be attached directly to the metal rafters at the soffit, the assertion that the

Contract drawings required a gypsum board substrate, agreeing to the gypsum board substrate if the thickness of the insulating board was reduced and proposing that a vinyl soffit instead of the EIFS soffit be installed. (R4, tabs 11, 31; Exhs. A-13, G-12, 25, 29, 30, 42; Tr. vol. I: 36-39, 42-43, 54-55; Tr. vol. II: 319-20)

The gypsum board for the soffit arrived on site April 17, 2000 and was installed May 5, 2000 in conjunction with GCC's wallboard subcontractor completing the interior wallboard installation. Prior to the installation of the substrate, the soffit was open from the edge of the exterior wall to the roof fascia. GCC's EIFS subcontractor returned to the site May 6 or 7, 2000 and applied the EIFS to the soffit. (Exh. A-13, Tr. vol. I: 55, 57)

Asserting that completion of the soffit was on the project critical path, GCC seeks payment for 192 days of its "general conditions" costs from October 25, 1999, the date GCC forwarded its RFI to the VA, to the date the gypsum board on the soffit was completed, May 5, 2000. GCC asserts entitlement to these costs on the basis that each day the soffit remained unenclosed extended the completion date of the Contract by one day. As presented by GCC, its "general conditions" costs include such items as: project manager and superintendent salaries, vehicles, office trailer and other miscellaneous costs that are commonly referred to as "field overhead". (Exh. A-38; Tr. vol. I: 59)

Underlying its claim for its actual field overhead costs is GCC's assessment that completion of the soffit was on the project critical path because not having the soffit enclosed prevented "closing in" the Clinic. According to GCC, not having the soffit finished and the Clinic "closed in" prevented completion of interior finish work because of the danger of water or moisture intrusion from the unenclosed soffit. Mr. Berhle described the moisture problem variously as the open soffit permitting rain to enter into finished spaces or as the open soffit

allowing intrusion of moisture-laden air into finished areas. For rain to enter finished areas of the Clinic, even with the soffit open, it would have to enter under the eave and be blown vertically up and over the building interior construction. The Clinic has an exterior wall rising to the roof deck separating the attic space and building interior from the soffit area. This wall is composed of gypsum wallboard on the interior of the wall and, on the side facing the soffit area, there is baffled insulation with an outer paper facing. This construction effectively creates a wall several inches thick separating the soffit area from the interior of the building that creates a barrier to moisture between the soffit area of the roof structure and the interior of the building and attic space. (R4, tab 2; Tr. vol.: I: 76-79, 146-47, 151; Tr. vol. II: 381)

During the October 1999 to April 2000 period, the 13 window openings on the Clinic exterior remained unglazed and were covered, but not sealed, with plastic sheeting. GCC did not cover the soffit with plastic sheeting. Mr. Berhle testified that installing such sheeting on the soffit was possible but would be more difficult and expensive than covering window openings with plastic sheeting. (R4, tab 2; Tr. vol. I: 46-49, 89, 115-16, 119, 291; Tr. II: 382-83)

There is no evidence tracing the point of entry of any excessive moisture or water in the Clinic to the open soffit. Only minor water intrusion problems, mostly attributable to ripped plastic over window openings, were experienced in the October 1999 to April 2000 timeframe. (Tr. I: 182-183; Tr. vol. II: 382-830)

The Clinic soffit was designed to be vented. A soffit is vented in order to allow the free exchange of air between an attic space and the outside to prevent condensation of moisture in attic spaces. (R4, tabs 1, 2; Tr. I: 150; Tr. II: 413-14)

GCC did not complete the framing in the soffit (metal “kickers” or rafter extensions) to which a substrate could be attached until early-January 2000. (Exh. G-5; Tr. I: 326)

Interior finish drywall on the exterior walls could not be installed until the window frames were installed. Window frames for the Clinic were specially manufactured for the project and had a 7-10 week lead-time. GCC submitted its window shop drawings for VA approval on January 31, 1999; the VA approved this submittal February 9, 2000. GCC began installing the window frames on April 27, 2000. The window installation, including glazing, was completed June 5, 2000. (Exhs. G-20, G-29; Tr. vol. I: 85, 87; Tr. II: 387-88, 413-14, 432, 440-41)

Interior drywall in the clinic was 90% complete on March 16, 2000. In rooms containing windows; interior drywall stopped two to four feet from the interior of the exterior wall. After March 16, 2000, GCC performed no additional drywall work until May 4, 2000 when the window frames were installed. (Exhs. G1A, G-3, G-16; Tr. II: 440)

During the October 1999 to May 2000 timeframe, substantive work on the Clinic progressed, including work on CCOs and SAs. During this period, GCC was paid \$649,207.76 in progress payments for work it performed. (Exhs. A-28-32; G-1, G-1A)

The Contract did not require a Critical Path Method (CPM) schedule. Neither GCC’s schedule submissions nor any other evidence in the record indicate when GCC originally planned to have the soffit enclosed and the EIFS applied, or whether the soffit completion was on the original scheduled critical path. (R4, tabs 16-17; Exhs. A-5, A-25)

Joseph Gyomory, the VA’s expert on construction claims and contract scheduling, prepared an as-built schedule by consulting with Mr. Cooney, a

representative of the A/E and Edward Litvin, the Contracting Officer's Technical Representative (COTR), reviewing the project daily logs and other documentary evidence. Taking into account all SAs and CCOs issued during the construction of the project, Mr. Gyomory concluded that the extended Contract completion date should have been March 2, 2000, not the February 2 date recognized by the VA. This left three months between the completion of the last change order, and the VA's acceptance of the Clinic as substantially complete. Through his review of the Contract documents, daily logs and project files and interviews of the COTR and CO, Mr. Gyomory came to the conclusion that the fabrication and installation of the Clinic windows represented the critical path of construction after March of 2000 and window completion was driving the progress of the project. (Exh. G-1; Tr. II: 427-32)

According to Mr. Gyomory's analysis, the testing and balancing of the mechanical air control systems, the security system or the finishing of interior walls adjacent to the windows could not be completed until the windows were glazed. In sum, Mr. Gyomory pegs the critical path of the project from March 2000 to May 2000 as running through the windows, not the soffit. (Exhs. G-1, G-1A; Tr. vol. II: 425-59)

VABCA-6597, Interest

From February 2000 through July 2000, GCC made a series of drawdowns on a \$500,000 line of credit it maintained at its bank. For these draw downs, GCC incurred \$15,201.25 in interest expenses. (Exh. A-27; Tr. vol. I: 62-64)

The funds obtained from the line of credit were used to pay GCC's general business expenses and the salary costs of the GCC supervisory personnel on the Clinic project. Mr. Berhle represented that the drawdowns were necessitated by

GCC's inability to obtain payment from the VA for various change orders and the costs of delay. During the February to July 2000 period, the VA paid GCC approximately \$391,000 for its Contract work and, by August 14, 2000, GCC had been paid \$1,415,085 of the \$1,503,559.80 Contract price. By the end of July, GCC had requests for equitable adjustment pending totaling \$296,000. Also, during the February 2000 to July 2000 time period, GCC was actively working on two or three other construction projects in addition to the Clinic. (Exhs. A-30-34; Tr. vol. I: 62-64, 97-99)

VABCA-6598, Contract Balance/Punch List

The VA accepted the Clinic as substantially complete on June 26, 2000. At the time of the acceptance, the fire alarm and security systems were incomplete, the boiler was not yet operable and the gutters and downspouts had not been installed. In addition, there were numerous other substantial work items that remained uncompleted. (Tr. vol. I: 117-18, 186-190; Tr. vol. II: 472-74)

The "final" inspection leading to the VA's acceptance was conducted June 2, 2000. In conjunction with the acceptance for substantial completion on June 26, 2000, the VA issued a 100-item punch list, which it valued at \$132,450. The VA determined to accept the Clinic as substantially complete in order to accommodate the date set for the public commissioning ceremony at the Clinic to be attended by various dignitaries. (R4, tab 26; Tr. vol. II: 474-75, 535)

From June 26 to September 8, 2000, items on the punch list with a value of \$40,350 were completed or otherwise resolved. On September 8, 2000, by CCO #3, the VA unilaterally reduced the Contract price by \$92,100, the amount

of the VA's valuation of the remaining punch list items. The VA subsequently paid GCC an additional \$15,356 on November 30, 2000 for punch list items resolved from September 8, 2000 to November 13, 2000. (Exhs. A-8, A-37)

At the time the VA accepted the Clinic, several of GCC's requests for equitable adjustment or proposed CCOs involving several of GCC's major subcontractors were pending. Most of these proposed CCOs were not resolved for more than a year after the date of substantial completion. Meanwhile, GCC's subcontractors refused to complete their work until GCC dealt with their claims. Moreover, Mr. Behrle asserted that this contracting situation, particularly with regard to the outstanding electrical work, inflated the bids for the completion of the punch list work since the bidders looked to GCC's subcontractors to finish the work. The subcontractors, according to Mr. Behrle, took advantage of the situation by submitting high prices for the completion of their work. (R4, tabs 7-12; Tr. vol. II: 550-51)

Prior to the VA's issuance of CCO #3, GCC and the VA conducted desultory negotiations on the punch list. During that time, the VA provided GCC with no backup or justification for its estimated value of the work to be completed. After the VA issued CCO #3, Mr. Behrle concluded that the VA had so substantially altered the contracting relationship that there was little reason to pursue resolution of the punch list. Mr. Behrle was of the firm belief that the VA's valuation of the punch list was wildly over estimated. At the hearing, Mr. Behrle posited that the punch list work was worth no more than \$10,000. (Exhs. A-8, A-44; Tr. vol. I: 157-58; Tr. vol. II: 462-63, 470, 547-49)

The punch list currently reflects 55 work items to be completed, the price of which the VA estimates to be \$76,544. This is the amount of the pre-CCO #3 contract balance to which GCC asserts it is entitled. (Tr. vol. I: 69-70, 125, 131)

The VA punch list estimates were prepared by Mr. Litvin, the COTR, using his experience and by reference to the R.S. Means estimating guides. In some cases, the prices presented by the VA in the punch list are substantially in excess of its actual estimate to complete the work item. Mr. Litvin set those inflated prices as a “negotiating” position in expectation of a GCC riposte to the claim. In August 2001, the VA issued an invitation for bids (“IFB”) for completion of some of the punch list work and for repair of water damage that had apparently occurred after the VA’s acceptance of the Clinic; the government estimates for the punch list work items in the IFB, in some instances, differ significantly from the CCO #3 amounts. The bids for the completion IFB were opened on October 5, 2000 with the low bid being \$154,000; the total Government estimate for the completion IFB was \$65,349. (Exhs. G-32, 33; Tr. vol. I: 235; Tr. vol. II: 495-500)

The VA organized the punch list items by the relevant specification section and so identified them. The following table, derived from the VA’s punch list (Exh. A-9), Mr. Litvin’s notes on his estimates (Exh. G-32), the Government estimate for the completion IFB (Exh. G-33), and GCC’s claim (Exh. A-9) in which GCC conceded its liability for some punch list items reflects the parties’ various valuations for incomplete work items.

PUNCH LIST # AND DESCRIPTION	PUNCH LIST AMOUNT	LITVIN PUNCH LIST ESTIMATE	IFB ESTIMATE	GCC AMOUNT
1A. DEMOBILIZATION CLEAN-UP	\$2,500	\$2,500	N/A	NONE
1B. AS-BUILT DRAWINGS	\$500	\$500	N/A	\$200
1C. PHOTOGRAPHS	\$44	\$44	N/A	NONE
1D. PAYROLLS	\$1,000	\$1,000	N/A	NONE

PUNCH LIST # AND DESCRIPTION	PUNCH LIST AMOUNT	LITVIN PUNCH LIST ESTIMATE	IFB ESTIMATE	GCC AMOUNT
2A. ASPHALT	\$1,000	\$1,000	N/A	\$400
2E. SANITARY CLEAN-OUTS	\$500	\$500	N/A	\$100
2F. PAVEMENT MARKING	\$400	\$400	N/A	\$400
2G. LANDSCAPE REPLACEMENT	\$1,000	\$1,000	N/A	NONE
2I. DIVISION 2 SUBMITTALS	\$500	\$500	N/A	NONE
4C. CLEAN MASONRY	\$500	\$500	N/A	NONE
4F. MASONRY SUBMITTALS	\$500	\$500	N/A	NONE
5A. ACCESS LADDER	\$4,000	\$3,620	\$3,052	NONE
7B. SOFFIT VENT CORRECTION	\$2,000	\$1,621	\$1,621	250
7C. COMPLETE EIFS AND CORRECTIONS	\$250	\$250	N/A	NONE
7E. CAULK AND SEAL EXTERIOR	\$1,500	\$421	\$292	\$50
7G. FIRE STOP AND PATCH PENETRATIONS	\$250	\$182	\$182	NONE
7H. GUTTERS AND DOWNSPOUTS	\$4,000	\$4,100	\$3,261	\$1,500
7I. DIVISION 7 SUBMITTALS	\$500	\$500	N/A	NONE
8A. CARD KEY ELECTRONIC LOCK INSTALLATION	\$2,500	\$2,602	\$2,150	\$600
8B. CLEAN WINDOWS	\$500	\$500	N/A	NONE

PUNCH LIST # AND DESCRIPTION	PUNCH LIST AMOUNT	LITVIN PUNCH LIST ESTIMATE	IFB ESTIMATE	GCC AMOUNT
8G. DIVISION 8 SUBMITTALS	\$500	\$500	N/A	NONE
9A. & 9B. MISCELLANEOUS PAINTING	\$3,250	\$1,308	\$757	\$200
9C. INSTALLATION OF COVE BASE	\$2,000	\$188	\$459	\$200
9D. CEILING TILE REPLACEMENT AND INSTALLATION	\$500	\$196	N/A	\$100
9G. SET FLOOR SINK	\$1,500	\$1,101	\$980	\$300
9I&J. MECH. & ELEC. ID LABELING	\$1,750	\$685	\$551	NONE
9K. PROVIDE AND INSTALL CEILING MARKERS	\$700	\$280	\$446	\$200
9L. DIVISION 9 SUBMITTALS	\$500	\$500	N/A	
10A. EXTERIOR SIGNAGE	\$250	\$250	N/A	\$250
10C. DRESSING NOOK PARTITION	\$8,500	\$8,897	\$7,156	\$2,000
10D. FIRE EXTINGUISHER CABINET	\$400	\$400	\$258	\$200
10E. PROVIDE AND INSTALL TOILET & BATH ACCESSORIES	\$2,500	\$1,712	\$1,645	\$750 OR \$1,308
10G. HANDRAILS, WALL & CORNER GUARDS	\$7,000	\$10,710	\$8,589	\$3,200 OR \$2,025
10H. DIVISION 10 SUBMITTALS	\$250	\$250	N/A	NONE
12A. ENTRANCE GRID MAT	\$1,200	\$1,663	\$1,374	\$800
12C. PHARMACY DISPENSING WINDOW	\$5,000	\$5,384	\$4,492	\$3,159

PUNCH LIST # AND DESCRIPTION	PUNCH LIST AMOUNT	LITVIN PUNCH LIST ESTIMATE	IFB ESTIMATE	GCC AMOUNT
15C. RELOCATE INTERIOR SANITARY CLEAN-OUT	\$100	\$117	N/A	NONE
15D. EXHAUST FAN SPEED CONTROL	\$2,000	\$1,354	\$1,197	\$NONE
15E. CONNECT EXHAUST FAN EF-8	\$500	\$242	\$220	NONE
15G. COMPLETE SPRINKLER SYSTEM	\$1,500	\$1,485	\$1,302	NONE
15H. COMPLETE BOILER & HEATING SYST. INSTALLATION	\$2,500	\$1,400	\$1,454	\$300
15P&Q. PLUMBING & SPRINKLER SUBMITTALS	15P: \$750 15Q: \$500	15P: \$750 15Q: \$500	N/A	15P: \$250 15Q: NONE
15S. SPRINKLER SYSTEM M&O INSTRUCTIONS	\$200	\$200	N/A	\$200
15T. BOILER SYSTEM M&O INSTRUCTION	\$500	\$500	N/A	\$200
15V. WATER TREATMENT M&O INSTRUCTION	\$200	\$200	N/A	\$200
16D. COMPLETE FIRE ALARM SYSTEM & CORRECTIONS	\$2,000	\$890	\$768	\$500
16E. COMPLETE MOTION DETECTION SYSTEM	\$1,000	\$800	\$800	\$500
16F. REMOVE TEMP. ELECTRICAL CIRCUITS	\$500	\$580	N/A	NONE
16G. LABEL ECT. EQUIP. & PANELBOARD	\$1,500	\$1,208	\$1,103	\$300
16H. FIRE ALARM SYSTEM INSTRUCTION	\$1,000	\$1,000	N/A	\$500
16J. FIRE ALARM SPARE PARTS	\$500	\$400	N/A	NONE
16L. DIVISION 16 SUBMITTALS	\$750	\$750	N/A	NONE

Nine of the punch list items, (Items 2I., 4F., 7I., 8G., 9I., 10H., 15P., 15Q., 16I.) totaling \$4,750, are for submittals. These submittals were called for in the Contract to allow the VA to be assured that GCC's installations would be in accordance with the Contract requirements. Any work installed by GCC for which it did not provide submittals was at GCC's risk that the work would not meet the requirements of the drawings and specifications. Mr. Litvin arrived at the estimated price for submittals by employing a "rule of thumb" that each submittal was worth \$250. Using an estimate that submittals required by the Contract cost 1.5% of the Contract price, Mr. Litvin calculated a \$250 per submittal price estimate by dividing the number of required submittals into the amount representing 1.5% of the Contract price. The 1.5% factor was assigned by Mr. Litvin after his assessment of the nature of the Contract work in light of an R.S. Means estimating guideline that contract submittals add 2-3% to a contract price. (Exh. G-32; Tr. vol. I: 226, 260)

After GCC left the site, it did not fully restore the landscaping at its construction trailer pad and did not remove several chunks of concrete. The VA restored the pad site and removed the concrete with its own forces. Mr. Litvin's assigned value for Punch List Item 1A., Demobilization and Clean-up Costs, was an estimate based on his experience with grounds maintenance and the costs involved. GCC, in the meetings with the VA on the punch list, objected to the assessment as excessive. (Exhs. A-10, G-32; Tr. vol. I: 216-17, 287-88)

GCC did not provide as-built drawings (Punch List Item 1B.) as required by the Contract; Mr. Litvin subjectively valued the drawings at \$500. (Exhs. G-32, A-10; Tr. vol. I: 219)

The VA originally valued the required project photographs (Item 1C.) at \$250; GCC delivered some photographs and the VA paid GCC \$206. There is no evidence in the record establishing the basis for the continued assertion of withholding the remaining \$44. (Exhs. G-32, A-10; Tr. vol. I: 219)

The \$1,000 withholding asserted for subcontractor payrolls not submitted by GCC (Item 1D.) reflects a few minor payroll errors or missing pages of payrolls submitted by GCC. The CO acknowledged that GCC's provision of corrected payrolls would be immaterial. (Exhs. A-10, G-32; Tr. vol. I: 219-20; Tr. vol. II: 487)

The VA, as part of the preparation for the Clinic commissioning ceremony, contracted for \$4,400 of asphalt work. Mr. Litvin subjectively allocated \$1,000 of that work (Item 2A.) to repairs that were the responsibility of GCC. GCC acknowledges that additional patching of two trenches it cut in a parking lot was required, work GCC values at \$400. (Exhs. G-32, A-9, A-10; Tr. vol. I: 221, 270; Tr. vol. II: 493-94, 545)

Item 2E., Sanitary Clean-outs, involved some finish grading and capping of plastic above grade pipes leading to the sanitary pipes. The VA finished two of the clean-outs and Mr. Litvin assigned the cost of \$500 for the VA employees to perform this work based on his experience. (Exhs. G-32, A-10; Tr. vol. I: 223)

GCC acknowledged that it did not perform the pavement marking (Punch List Item 2F.) required under the Contract and that the value of this work was \$400 as asserted in the punch list. (Exhs. G-32, A-9, A-10; Tr. vol. I 224)

Mr. Litvin ascribed \$1,000 as the punch list amount for replacement of damaged landscaping (Item 2G.) based on his "general experience managing landscape contracts." The "plant corrections" for which the VA seeks payment from GCC were, in part, in anticipation of damage to planting beds around the

Clinic that Mr. Litvin expected to be caused by the lack of gutters on the building. A copy of a photograph dated August 21, 2000 in the record purporting to show landscape damage resulting from the lack of gutters shows some apparent bare patches in the grass at the Clinic roofline. (Exhs. A-10, G-32; Tr. vol. I: 224-225, 286)

The VA acknowledges both that GCC completed Item 4C., Clean Exposed Masonry, and that it had not yet paid GCC for the work. (Exhs. A-10, G-32; Tr. vol. I: 226)

GCC constructed a ladder to access an air-handling unit that did not meet Contract requirements. For rebuilding the ladder to bring it to Contract and Occupational and Health Safety Administration standards, the VA assessed \$4,000 in the punch list (Item 5A.); its estimate for the work in the completion IFB was \$3,052. (Exhs. A-10, G-32, G-33; Tr. vol. I: 228, 284-85)

The VA approved GCC's installation of round, aluminum, 3" vents in the soffit. The face of the installed vents consists of several parallel vanes. These vanes are angled to one side of the interior of the soffit. As installed by GCC, the vanes on one long side of the building were oriented parallel to the soffit line not perpendicular as required for proper ventilation. The VA listed the reorientation of the vent vanes as a punch list item (Item 7B.). Reorientation involves use of a stepladder and turning the vent in the soffit by hand. In addition, GCC installed the vents at a spacing of 24" on center; the VA maintains that the vents should have been installed 10" on center and included costs on the soffit vent punch list item for installing approximately 200 more vents. The Contract specifications, Section 07700, specify a continuous, metal soffit vent with an open area of 9 square inches per lineal foot. The Contract drawings depict 3" round soffit vents, not a continuous soffit vent. The 3" round vents have approximately 7.1 square

inches of open area and would have to be installed approximately 10" on center to meet a 9 square inch per lineal foot free opening requirement. The Contract drawings contain no instruction on vent spacing. GCC submitted no shop or coordination drawings to the VA describing how, and at what spacing, it intended to install the soffit vents. There is nothing in the record indicating that round vents installed 24" on center met the specified free opening requirement. The VA valued the soffit vent work at \$2,000 in the CCO #3 punch list; its completion IFB estimate is \$1,621. GCC contests the need for additional vents and that the orientation of the vanes was a contract requirement; it recognizes an exposure for this punch list item as \$250. (R4, tabs 1, 2; Exh. A-9, A-10, G-32; Tr. vol. I: 229; Tr. vol. II: 501-05, 533-34, 546-47, 560)

The VA assessed GCC \$250 for completion of some EIFS work in Punch List Item 7C. There is nothing in the written record or testimony supporting this charge. (Exh. A-10)

Finding caulking and sealing work (Punch List Item 7E.) incomplete on the exterior of the building, the VA assessed \$1,500 for this work. The VA estimated a value of \$292 for the work in its estimate for the completion IFB. GCC estimates that the exterior caulking and sealing remaining to be completed at the time of substantial completion is \$50. (Exh. A-9, A-10; Tr. vol. I: 229-30)

The VA, in Item 7G., assessed GCC \$250 for fire stopping and patching penetrations in mechanical and electrical rooms; the VA's completion IFB values the work at \$182. (Exh. A-10; Tr. vol. I: 231)

CCO #3 reduced the Contract price by \$4,000 for the installation of gutters (Item 7H.). Gutters were not installed on the Clinic; GCC's roofing subcontractor refused to install the gutters until its claim for the additional costs of installing polyiso insulation on the roof was resolved. (Exhs. G-32, G-33, A-9, A-10; Tr, vol. I: 232; Tr. vol. II: 506, 532-33)

The Contract required that certain doors be fitted with electronic locks operated with card keys. This work was not completed at the time the VA accepted the Clinic as substantially complete and was included on the punch list as Item 8A. (Exh. G-32, G-33, A-9, A-10; Tr. vol. I: 234)

VA personnel cleaned the Clinic windows after acceptance for substantial completion. Mr. Litvin estimated that this in-house effort cost \$500, which is the amount the VA reduced the Contract price as represented on Item 8B. of the punch list. (Exh. A-10; Tr. vol. I: 274)

Punch List Items 9A. and 9B. were for finish and touch-up painting of various parts of the Clinic. Mr. Litvin assigned an excessive price for the work in the punch list to achieve a favorable position in anticipation of GCC negotiating the price for painting. (Exhs. A-9, A-10; G-32, G-33; Tr. vol. I: 235-36; Tr. vol. II: 507-10)

Mr. Litvin grossly inflated the cost of finishing the installation of cove base (Item 9C.) as a negotiating ploy in the CCO #3 punch list. VA forces performed some of the cove base work and some of the work was in the completion IFB. A part of the work required was reattachment of loosened cove base, work characterized by Mr. Litvin as "to be expected" after use of the Clinic by the VA. (Exhs. A-9, A-10; G-32, G-33; Tr. vol. I: 237; Tr. vol. II: 507-10)

Clinic maintenance personnel replaced and adjusted some tiles in the hung ceiling after the Clinic was accepted for substantial completion (Punch List Item 9D.). Mr. Litvin, classifying this work as "minor," valued the in-house effort at \$500. (Exhs. A-10, G-32, G-33; Tr. vol. I: 238, 280-81)

GCC improperly set a molded floor sink in the tile floor in a janitorial area. In addition to the actual setting of the sink, tile work in the janitorial area had to

be reworked. The VA assessed \$1,500 for the cost of this work in the CCO #3 punch list; however, the IFB estimate indicated a \$980 cost for this item (9G.). GCC acknowledged a \$300 cost for the sink reinstallation only. (Exhs. A-9, A-10, G-32, G-33; Tr. vol. I: 238-39)

Items 9I., J., K. of the punch list involve marking and painting pipe and conduit as well as providing push-pin markers in the dropped ceiling tiles to identify locations of various pipes and valves. The painting and marking is required by the Contract and was not performed by GCC. GCC recognizes that the ceiling markers needed to be installed. (R4, tab 1; Exhs. A-9, A-10, G-32, G-33; Tr. vol. I: 239-41)

Item 10A. of the punch list relates to an exterior signage requirement of the Contract. The value of this work was originally set at \$1,500 in the punch list; the VA subsequently paid \$1,250 of that amount to GCC. The record contains no information regarding the basis for the continued withholding of the remaining \$250. However, GCC recognizes a \$250 value for this punch list item. (R4, tab 1; Exhs. A-9, A-10, G-32; Tr. vol. I: 211)

The Contract required installation of 18 “dressing nook” partitions in the Clinic examination rooms; the partitions were not installed by GCC (Item 10C.). The material price of the partitions was \$392 each. (R4, tabs 1, 2; Exh. A-9, A-10, G-32, G-33; Tr. vol. I: 242)

As acknowledged by GCC, it did not install a required fire extinguisher cabinet. The CCO #3 price reduction of \$400 assessed for the cabinet installation was reflected in Punch List Item 10D. The VA installed the cabinet. (R4, tabs 1, 2; Exhs. A-9, A-10, G-32, G-33; Tr. vol. I: 242-43)

Installation of accessories in the Clinic bathrooms remained unfinished at acceptance for substantial completion. These accessories (toilet tissue dispensers,

soap dispensers, towel bars and mirrors) were not provided by GCC, although GCC did install grab bars in the toilets. In its claim, GCC earlier acknowledged responsibility for \$750 for this punch list item (10E.) but, at the hearing, provided a quote of \$1,308 for the material cost of the accessories to be installed. (Exhs. A-9, A-10, A-47, G-32, G-33, Tr. vol. I: 243; Tr. vol. II: 554)

GCC recognized a \$3,200 responsibility for installation of handrails, wall guards and corner guards (Item 10G.); it subsequently provided a quote for materials for wall guards and corner guards of \$2,025. The government material estimate for those items is \$3,175. There is a large difference in the amount of material between the GCC quote and the Government estimate; however, GCC's quote did not include the handrails or bumper rail. The handrail is a somewhat expensive specialty wood item. The amount assessed in the punch list for this work is substantially below Mr. Litvin's estimate and the completion IFB estimate. (Exh. A-9, A-10, A-46, G-32, G-33; Tr. vol. I 243; Tr. vol. II: 552, 554)

Item 12A. of the punch list is a grid mat to be placed at the Clinic entrance. Although required to do so by the Contract, GCC did not provide the mat. (R4, tab 1; Exhs. A-9, A-10, G-32, G-33; Tr. vol. I: 244-45)

The Contract drawings depict both a secure window dispensing ("deal) tray and window dispensing drawer unit for the Clinic pharmacy. There is no written specification in the Contract addressing the dispensing window/ deal unit. Since the unit shown in the Contract drawings was no longer available, GCC endeavored to supply a different window/ deal arrangement using a deal drawer and not a tray. The VA punch list priced a particular model window/ tray at \$4,047 for materials; GCC during its performance had received a quote of \$2,814 (inclusive of miscellaneous fasteners and sealers) for a different model window/ dispensing unit from the same manufacturer. There is no

evidence in the record regarding whether the unit proposed by GCC met Contract requirements. The VA labor estimate for the work is \$445. The VA, as reflected in Item 12C., demanded a unit incorporating a secure deal tray in lieu of a drawer. (R4, tabs 1, 2; Exhs. A-9, A-10, A-47, G-32, 33, Tr. vol. I: 244-45, 276-77; Tr. vol. II: 468; 552-53)

Alleging it had to paint a wall and install a pipe cap, the VA assessed GCC for the \$100 of the costs of relocating an interior sanitary clean-out in Item 15C. of the punch list. The work was apparently done with the VA's own forces. (Exh. A-10)

Eight of nine exhaust fans in the clinic did not have required speed controls installed; in Item 15D., the VA assessed GCC an amount almost \$700 in excess of its estimate of the cost of installing speed controls. (Exh. A-10, G-32, G-33; Tr. vol. I: 246-47)

Electrical power was not connected to Exhaust Fan EF-8 at the time of the VA's acceptance of the Clinic for substantial completion. The VA included this connection as Item 15E. of the punch list and as part of the scope of work for the completion IFB. (Exhs. A-10, G-32, G-33)

Although the fire sprinkler system had been installed, GCC had not yet tested and adjusted the system (15G.) nor had it provided the required documentation of the final testing and adjustments when the Clinic was accepted as substantially complete. Both the CCO #3 and IFB estimates for testing and adjustment of the fire sprinkler system include amounts for signage, 24 hours of labor and a lump sum amount of \$500. There is no evidence in the record to supporting a basis for assessing the cost of the signage or lump sum amounts. (Exhs. A-10, G-32, G-33; Tr. vol. I: 247-48)

The boiler and heating water systems were essentially complete when GCC turned the building over to the VA. However, some minor final work and testing and corrections remained to be accomplished and the boiler was not operable. The VA included this work in the punch list (Item 15H.), which, in the IFB estimate, it valued at \$1,454 although the VA assessed GCC \$2,500 for this work in CCO #3. (Exhs. A-9, A-10, G-32, G-33; Tr. vol. I: 187-88, 193, 248; Tr. vol. II: 434, 444-45, 473-74)

The Contract required GCC to provide maintenance and operating instruction for the major systems it installed; that instruction was not provided. The instruction not provided is reflected in Items 15S., T., V. and 16H. of the punch list. GCC, as reflected in its claim, conceded its obligation to provide the instruction, the cost of which it set at \$1,100. The VA valued the instruction at \$1,900 in the estimate used in CCO #3. (Exhs A-9, A-10, G-31; Tr. vol. I: 250-51, 254)

It is apparently uncontested that the fire alarm system required some minor additional work and some corrections and adjustments at the time of the VA's acceptance of the Clinic as substantially complete. GCC represented the fire alarm system as 99% complete and that, at most, it would take an electrician only a few hours to make the necessary final connections. This work is represented in Item 16D. of the punch list and the fact that the fire alarm system was not functioning did not prevent the VA's acceptance of the Clinic because the building was fully sprinklered. The VA assessed GCC \$2,000 for the work in CCO #3 but set the price at \$768 in the IFB estimate. GCC acknowledges a \$500 liability for the work. (Exhs. A-9, A-10, G-32, G-33; Tr. vol. I: 188, 191, 197, 247, 254; Tr. vol. II: 471-72, 529-30, 549)

The motion intrusion detection system (Item 16E.) was not operational on the date of the VA's acceptance of the Clinic. Minor hook-up work remained to

be completed. The VA and GCC value this work at \$800 and \$500 respectively. (Exhs. A-9, A-10, G-32; Tr. vol. I: 191, 252)

GCC was required to remove temporary electrical circuits it installed for construction purposes. Those circuits were still in place when the VA accepted the Clinic as substantially complete. The VA removed the circuits with Mr. Litvin estimating the cost of the removal effort in Item 16F. based on his experience with supervising electrical work. (Exh. G-32; Tr. vol. I: 252-53)

GCC had not labeled the electrical circuits it installed at the electrical panels when the VA accepted the Clinic, a fact acknowledged by GCC. Mr. Litvin set the estimated cost of \$1,103 in the IFB estimate for this work in Item 16G. based on his experience of the effort an electrician would have to expend to trace circuits. (Exh. G-32, G-33; Tr. vol. I: 253-54, 275-76)

GCC did not provide the stock of spare parts for the fire alarm system that the Contract required; the VA included the estimated cost of spare parts of \$400 as Item 16J. of the punch list. (Exh. G-32; Tr. vol. I: 254-55)

DISCUSSION

VABCA-6594, Street Light Circuit

The VA does not dispute GCC's entitlement to an equitable adjustment for its replacement of the street light circuit. As conceded by Mr. Behrle, the only issue before us is the amount of the backhoe rental costs to be included in the equitable adjustment for the circuit replacement change. The installation of the street light circuit took 24 days. It is clear that the backhoe was not used on all those 24 days on circuit installation work. However, we find that it was not practical for GCC to rent the backhoe for a shorter period due to the nature of the work and that it was reasonable for GCC to have the backhoe on site during the

period of circuit replacement. Thus, we find that 24 days of backhoe rental to be a reasonable, direct cost of street light circuit installation.

As invoiced to GCC, rounding to the nearest dollar, backhoe rental was \$98.00 per day. Consequently, GCC is entitled to \$2,352 for backhoe rental. The VA has already allowed \$750 for backhoe rental for the replacement of the streetlight circuit; thus, GCC is entitled to an additional direct cost of \$1,602. Adding overhead and profit in accordance with the Contract provisions, the total additional amount to which GCC is entitled for backhoe rental is:

Net Additional Cost:	\$1,602
Overhead at 10%:	<u>160</u>
Subtotal:	1,762
Profit at 10%:	<u>176</u>
Total	\$1,938

VABCA-6595, Extended General Conditions

GCC claims \$121,271 for its field overhead costs at a daily rate of \$631 plus overhead and profit because of the VA's failure to provide direction regarding the soffit substrate from October 25, 1999 to May 5, 2000. GCC essentially claims that the VA's failure to provide direction on the soffit substrate constructively suspended work on the Contract until the VA responded to GCC's October 25, 1999 RFI by directing the installation of exterior gypsum board on the soffit. To be successful in its claim, GCC must prove that the VA's failure to provide direction on the soffit substrate unreasonably extended Contract performance time. *P. J. Dick Incorporated*, VABCA Nos. 5597, *et. al.*, 01-2 BCA ¶ 31,647.

GCC fails to prove that not having the soffit substrate installed until May 5, 2000 extended the completion date of the Contract.

While we agree that the Contract drawings do not show a substrate on the soffit and that the installation of exterior gypsum board on the soffit as the IFS

base may be a Contract change, there is simply is no evidence to support that having an open soffit extended the Contract completion date by 192 days. GCC's claim rests solely on Mr. Behrle's conclusory assessment that the open soffit was the only cause preventing completion of interior work. The facts in the record belie Mr. Behrle's assertion. In the first place, framing in the soffit to which the gypsum board could be attached was not installed until early January 2000; there is nothing in the record ascribing the lack of framing to the VA. There also is no evidence, other than Mr. Behrle's assertions, that moisture coming from the open soffit affected interior finish work in the building. There is credible evidence, however, that window installation directly affected interior finish work since the drywall on the interior of the Clinic exterior wall at the windows could not be completed until installation of the window frames. Window frames, regardless of the color, were a custom item with a 7-10 week lead-time. GCC did not even make its window submittal until January 31, 2000 and began installing the window frames April 27, approximately 10 weeks after the VA's February 9, 2000 approval of the submittal. GCC provides no proof that that VA delayed installation of the windows. Moreover, during the October 1999 to May 2000 period, during which GCC alleges it was prevented from working on the interior of the building, GCC installed more than 43% of the Contract work, including 90% of interior dry wall and dry wall finishing.

The actions of both parties with regard to the soffit are puzzling to say the least. On the part of the VA, the strained interpretation of the Contract drawings promulgated by the VA's A/E, asserting that a miniscule blank space or fine line on the drawing detail depicted the soffit substrate and the A/E's initial position that the coffee cup consistency plastic insulating EIFS backer board could be attached by screws directly to metal rafters at the soffit strains credulity.

Similarly, GCC's obstinacy in refusing to install \$2,500 to \$3,000 of exterior gypsum board on the soffit for six months because of the lack of a specific VA direction defies understanding when the EIFS manufacturer and trade practice clearly contemplate that the EIFS insulating board will be attached to a rigid substrate, such as the exterior gypsum board. If the unfinished soffit was, in fact, holding up its completion of Contract, either GCC's insistence on specific direction from the VA before installing the substrate or its failure to place plastic sheeting over the soffit, or both were unreasonable.

GCC did not assert that the failure to install the EIFS on the soffit delayed completion of the Clinic until after the VA's acceptance of the project. Neither party evidenced any particular, contemporaneous concern that the unfinished soffit was holding up completion of the project while the Clinic was under construction.

GCC has not shown that the VA is solely liable for the failure to enclose the soffit, that the unenclosed soffit was sole cause for the extension of the Contract completion date or that the soffit issues increased its costs. Considering the Contract changes, the evidence indicates a Contract completion date of March 2000. Subsequent to March, it is clear that completion of the windows, if not controlling, affected Contract completion as much as the soffit enclosure. GCC cannot trump the evidence in the record simply by broad conclusory assertions. GCC simply has not proven that the VA unreasonably extended Contract completion by its failure to direct the installation of the soffit substrate. Thus, GCC cannot recover the actual costs of its field overhead between October 1999 and March 2000. *Dawson Construction, Inc.*, VABCA Nos. 3306 *et. al.*, 93-3 BCA ¶ 26,177, *aff'd*. 34 F.3d 1080 (Fed. Cir. 1994)

VABCA-6597, Interest

Interest cannot be recovered against the Government in the absence of Congress' consent by statute or an express contractual provision. However, where a contractor's borrowing can be directly traced to changed work, interest may be recovered as part of an equitable adjustment for the contract change. Merely showing business borrowings during a particular time period will not establish entitlement to recovery of interest costs as part of a change.

J. W. Bateson Company, Inc., VABCA No. 1148, 86-1 BCA ¶ 18,523; *Fletcher & Sons, Inc.*, VABCA-3248, 92-1 BCA ¶ 24,726; *Gevyn Construction Corp. v. United States*, 827 F.2d. 752 (Fed. Cir. 1987); *Dravo Corporation v. United States*, 594 F.2d. 842 (Ct. Cl. 1979).

There is no doubt that GCC paid its bank \$15,205.25 in interest for funds it received by drawing against its corporate letter of credit from February to July 2000. However, other than Mr. Berhle's uncorroborated assertions that all the interest payments were attributable to the VA's failure to pay sums to which he thought GCC was entitled, there is no evidence in the record to tie them to any specific item of changed work. The draws against the letter of credit occurred during a period in which work was drawing to a close since the VA accepted the Clinic work as substantially complete on June 26, 2000. We have no evidence that the letter of credit drawdowns were unusual in GCC's operation and GCC had other projects ongoing that presumably benefited from the borrowed funds. Since GCC has proven nothing other than that the funds realized from the letter of credit were needed to finance GCC's general business operations, it has not proven it is entitled to recover its interest expenses from February to July 2000 as a direct cost under this Contract.

VABCA-6598, Contract Balance/Punch List

That GCC did not complete the work items listed on the punch list is, for the most part, uncontested. There are questions raised as to level of completion of certain items, but we find that the evidence in the record supports a finding that GCC did not perform most of the work reflected in the punch list. What is in dispute is the value of the work GCC failed to perform. A review of the record reveals that, in large part, the amounts claimed by the VA for punch list work are founded on questionable estimates. Although there is no requirement that the VA “certify” its claims under the Contract, a reading of the FAR 32.610, 33.206 and 33.231 reveals, at a minimum, that the CO is obligated to present an objective basis for a Government claim and the amount of the claim based on supportable documentation. Here, the Government’s determination to present an initial punch list valued at a clearly inflated price of over \$132,000 and its subsequent decision to unilaterally reduce the Contract price by over \$92,000 was clearly not compliant with FAR requirements.

The method of establishing the value of work not completed by GCC is set forth in the Contract. The VAAR CHANGES-SUPPLEMENT clause, at subparagraph (h) states:

Where a change involves credit items only, a proper measure of the amount of downward adjustment in the contract price is the reasonable cost to the contractor if he/she had performed the deleted work. A reasonable allowance for overhead and profit are properly includable as part of the downward adjustment for a deductive change. The amount of such allowance is subject to negotiation.

It is well established that whenever a contracting officer issues a unilateral change order that deletes unfinished work in exchange for a credit against the

contract price, the Government has the burden of proving that the amount of that adjustment is reasonable. In making the determination of reasonableness of the downward adjustment, we are guided by the Contract language and what the record indicates that the deleted work would have reasonably cost the contractor. *Conner Brothers Construction Company, Inc.*, VABCA Nos. 2519, *et. al.*, 95-1 BCA ¶27,409; *Blount, Inc.*, VABCA No. 3236, 93-1 BCA ¶ 25,474; *State Mechanical Corporation*, VABCA No. 2797, 91-2 BCA ¶23,830; *Zurfluh Enterprises, Inc.*, VABCA No. 1941, 85-1 BCA ¶ 17,789.

For the Government to prevail, it must prove what it would reasonably cost GCC to perform the unfinished work in the summer or fall of 2000, including overhead and profit, and use that amount as the Contract price reduction. While proof of actual costs is more probative, parties have, at various times, successfully used their own experience and estimates to price the work to be completed. Depending on the record established, this type of evidence can be helpful in determining what the reasonable cost to the contractor would have been had the punch list actually been completed. *Conner Brothers Construction Company, Inc.*, 95-1 BCA ¶27,409; *Blount, Inc.*, 93-1 BCA ¶ 25,474.

The VA's proof of the punch list pricing here is problematic at best. As of the date of the hearing in this appeal, it had been 17 months since the VA's inspection of the Clinic for substantial completion; yet, the VA either could not or would not provide its actual costs for completing the punch list work. In fact, the VA did not take steps to complete most of the punch list work for over a year after it accepted the Clinic as substantially complete. We have in the record the VA's estimate of the price of the punch list work used for its unilateral price reduction in CCO #3, the Government estimate for the August 2001 IFB for completion of a portion of the punch list work, GCC's valuation of some punch

list items contained in its claim for payment of the Contract price, and GCC's estimates of some of the work presented. We find none of these various valuations to be determinative or totally reliable.

The prices of many of the items comprising the VA's CCO #3 punch list estimate were significantly and intentionally inflated. The VA IFB estimate reflects pricing over a year removed from substantial completion and neither of the VA estimates is adequately supported by objective evidence. GCC's estimates are similarly unsupported and reflect a negotiation position rather than an objective attempt to price the work.

However, when we evaluate the various estimates, there is enough information therein for us to reasonably approximate the price of the elements of the punch list work. In particular, we look to the VA's IFB estimate as the most reliable source to assist us in determining the value of the incomplete work. Consequently, since there is clear evidence that GCC did not complete the Contract work, and we have no more definitive way to establish the amount of the Contract price reduction to which the VA is entitled, we will value various elements of the punch list work using a "jury verdict" basis. *Trailboss Enterprises, Inc.*, VABCA No. 5454, 99-2 BCA ¶ 30,555; *Valley Forge Flag Co., Inc.*, VABCA Nos. 4667, 5103, 97-2 BCA ¶ 29,246; *Fanning, Phillips & Molnar*, VABCA No. 3586R, 96-2 BCA ¶ 28,427.

We note GCC's position that it should be relieved of the majority of liability for the punch list work because the VA arbitrarily forced the acceptance of the Clinic as substantially complete to serve its own interests to meet a specific commissioning date. GCC also argues that the VA forfeited its right to reduce the Contract price for the punch list by its actions after accepting the Clinic as substantially complete. These actions, the VA's persistent exaggeration of the

value of the punch list work, the VA's failure to address GCC's requests for equitable adjustment and GCC's resultant problems with its subcontractors and the VA's effectively removing the punch list work from the scope of the Contract by CCO #3, in GCC's, view so poisoned the Contractual relationship that the VA has no right to the remaining Contract balance.

GCC is not entitled to be paid the Contract price for work it did not perform. Certain of the major elements of work in the punch list reflect work GCC's subcontractors refused to perform because of disputes they had with GCC. GCC's position seems to be that it should be paid the balance of the Contract price because its subcontractor difficulties were caused by the VA's failure to address GCC's claims for changes. Even if we concluded that the VA's actions were questionable, the VA is entitled to reduce the Contract price for work not performed at a price determined in accordance with the terms of the Contract.

The VA's actions in prematurely accepting the Clinic as substantially complete to meet its commissioning date and its somewhat precipitous action to essentially throw GCC off the job by the CCO #3 inflated price reduction only two months after acceptance for substantial completion are factors that increased the cost of completing the work. In this context, GCC's reaction to CCO #3, where any further punch list work it would perform would have to be treated as a Contract change, to cease its attempts to complete the punch list is understandable. By CCO #3, the VA essentially terminated any obligation GCC had to continue performance to complete the punch list work.

Under the Contract, the measure of the Contract price reduction to which the VA is entitled is based on what it would cost GCC to complete the work in the summer or fall of 2000. The pricing reflected in CCO #3 reflects a price, in

some instances, for completing major work items in an occupied building nearly two years after the date of substantial completion. This price, by necessity, will be more than the amount for which GCC could have completed the work in the summer and fall of 2000. Although the facts surrounding the VA's acceptance of the Clinic as substantially complete and its subsequent actions do not entitle GCC to be paid for work it did not perform, we will take these factors into account in establishing the price of the punch list work items. In addition, where the VA fails to provide adequate proof of quantum for a punch list item, we will not allow a Contract price reduction for that item.

The VA assessed GCC \$4,750 for submittals GCC did not provide (Items 2I., 4F., 7I., 8G., 9L., 10H., 15P., 15Q., 16L.). Submittals (manufacturers' catalog cuts, sketches and other information) are made by a contractor for the VA's review prior to installation of work to provide assurance that the planned work will meet Contract requirements. A contractor runs the risk that work installed prior to receiving approval of submittals will not be acceptable. Here the VA allowed GCC to continue the work and accepted it despite the absence of various submittals. Consequently, since the work was acceptable, the VA received that what it bargained for in the Contract and we see no basis to now assess GCC for the absence of the submittals. Moreover, we are unconvinced that Mr. Litvin's "rule of thumb" valuation of the submittals has any basis in fact or reality and it cannot serve as proof of quantum. We will not allow a Contract price reduction for submittals.

The VA reduced the Contract price by \$2,500 for landscaping the GCC construction trailer pad and removal of some concrete chunks (Item 1A.). VA personnel performed this work. However, the VA provided no detail of what work was performed nor any documentation of the time spent by its personnel.

Apparently, Mr. Litvin arrived at the \$2,500 valuation solely on his subjective estimate based on his “experience” with grounds maintenance personnel, not by evidence of the actual effort expended by VA, evidence that should be readily available. Since the VA has failed to adequately prove the scope of the work it had to perform or to substantiate its valuation, this Contract price reduction also fails for lack of proof.

There is no dispute that GCC did not provide as-built drawings (Punch List Item 1B.). The VA and GCC value this work as \$500 and \$200 respectively. On a jury verdict basis we will allow a Contract price reduction of \$300 for as-built drawings.

The VA has provided no justification for retaining \$44 for project photographs (Item 1C.) that GCC delivered. We will not allow this Contract price reduction.

The CO admitted that there is no need for the payroll corrections (Item 1D.) for which the VA reduced the Contract price by \$1,000. Thus, we see no basis to reduce the Contract price by \$1,000 for correction of the payrolls.

At the time of the VA’s acceptance for substantial completion two trenches cut by GCC in an asphalt parking lot needed additional patching to meet Contract requirements. Mr. Litvin subjectively allocated \$1,000 of a \$4,400 contract for asphalt work to the patching of these two trenches; GCC recognizes \$400 as the cost of the trench repair (Item 2A.). The VA has completely failed in its proof of cost of this item and on a jury verdict basis we will recognize the amount conceded by GCC of \$400 as the appropriate Contract price reduction for this work.

On the evidence in the record, Item 2E., Sanitary Clean-outs, was obviously a minor item and clearly did not entail the VA’s expenditure of \$500 to have its personnel perform the work required. GCC recognized a \$100

responsibility for this item in its claim and, on a jury verdict basis we will allow the reduction of the Contract price in that amount for this work.

Since GCC acknowledged that it did not mark pavement as required by the Contract (Item 2F.) and agreed with the \$400 punch list assessment for this work in its claim, we will allow that amount.

The VA admits that its claim of \$1,000 for landscape replacement (Item 2G.) was based in anticipation of damage to the landscape resulting from the fact that gutters were not installed on the Clinic. The VA offered neither proof that this damage actually occurred nor any evidence supporting the amount of any damage. This claim fails for lack of proof.

The VA conceded that GCC completed masonry cleaning (Item 4C.). The \$400 price reduction taken in CCO #3 for this item will obviously not be sustained.

The air handling unit access ladder did not meet Contract requirements and required reconstruction. Mr. Litvin inflated the price reduction for the reconstruction of the access ladder (Item 5A.) reflected in CCO #3. As stated above, the IFB estimate provides the best source on which to base a reasonable price for GCC to accomplish the work in the summer or fall of 2000. Factoring in that the IFB estimate reflects the work being accomplished in the fall and winter of 2001 in an occupied building, we will use the IFB estimate reduced by 15% as the reasonable price for the work. Thus, we will allow a \$2,594 price reduction for Item 5A.

The Contract specifications required 9 square inches per lineal foot of open area in the soffit and the evidence is clear that GCC's soffit vent installation does not meet the open area requirement. GCC has not proven round soffit vent

installation 24" on center meets the Contract specification. The IFB estimate for the soffit vent work is \$1,621; that amount, reduced by 15% is \$1,378. We will allow a Contract price reduction of \$1,378 for Item 7A.

Since the VA failed to provide any evidence to support its assessment for EIFS completion (Item 7C.), we will not recognize the \$250 reduction claimed by the VA for this item.

The VA failed to provide any persuasive evidence to support its assessment of \$1,500 for Item 7E. for incomplete exterior caulking and sealing. In the absence of such proof, we will allow a Contract price reduction of \$50, the amount recognized by GCC.

Minor patching and fire stopping of penetrations in the Clinic mechanical and electrical rooms remained to be accomplished after the VA's acceptance for substantial completion. For the reasons expressed with regard to the valuation of the access ladder work we will reduce the VA's IFB estimate by 15% and allow a Contract price reduction of \$155 for Item 7G.

GCC did not install gutters and downspouts. The VA IFB estimate for this work is \$3,261; GCC asserts a price of \$1,500 for this work. We will allow a Contract price reduction of \$2,772, a 15% reduction of the IFB estimate for work reflected in Item 7H. of the punch list.

GCC acknowledged that it did not install the electronic locks as required by the Contract. It estimated the value of this work to be \$600; the VA IFB estimate for the work is \$2,150. We will reduce the IFB estimate by 15% and allow a Contract Price reduction of \$1,828 for Item 8A.

We will not allow the \$500 assessed by Mr. Litvin for window cleaning (Item 8B.). This work appears to be in the nature of maintenance and the VA has proven neither the cost of the effort nor GCC's Contractual responsibility for the window cleaning.

Mr. Litvin admitted the price reduction assessed for finish and touch-up painting was a negotiating ploy. Although the IFB estimate included \$757 for miscellaneous painting, the VA provided no probative evidence of the actual extent of finish and touch-up painting required or that the painting was GCC's responsibility and not the product of the VA's use of the Clinic after acceptance for substantial completion. In light of this, we will allow the \$200 amount acknowledged by GCC for the work for punch list Items 9A. and 9B.

Regarding the price reduction for reattaching loose cove base, it appears that the scope of cove base work to be completed at the time of the VA's acceptance was minimal. The VA represents that most of the cove base work was completed by VA personnel, but fails to provide any evidence of the extent of the VA's effort. We will allow the \$188 in the IFB estimate, not the \$2,000 assessed in CCO #3, as reasonably reflecting the scope of reattaching the cove base, Item 9C.

The work by VA personnel to replace and adjust ceiling tiles, based on Mr. Litvin's estimate of the extent of the work, was so minor as to fall within the range of maintenance work. With no evidence of when the work was performed or the actual extent of the VA's effort, we will not allow a Contract price reduction for Item 9D.

The IFB estimate most clearly reflects the cost of resetting the floor sink and accompanying tile work. We will allow a Contract price reduction computed by reducing the IFB estimate by 15% in recognition of the over one year delay in accomplishing the work and the changed working conditions under which the work had to be performed. This price reduction is \$833.

Similarly, on a jury verdict basis, we will reduce the IFB estimate for Items 9I., J., and K. by \$997 and allow a Contract price reduction of \$847 for installing pipe location markers and pipe identification labeling.

Since the VA has provided no evidence to support the continued withholding of \$250 for the exterior signage punch list item, we will not allow a Contract price reduction for Item 10A.

The IFB estimate for installation of the 18 “dressing nook” partitions in the Clinic examination rooms GCC failed to install is \$7,156. We will reduce that estimate by 15% and allow a Contract price reduction of \$6,083 for Item 10C.

GCC valued the material and labor cost of the fire extinguisher cabinets (Item 10D.) at \$200. The VA’s IFB estimate pegged the price at \$258; the price difference apparently being the cost of labor necessary to hang the cabinets. Since the VA has provided no evidence that its 4 manhour labor estimate is reasonable, we will utilize the amount recognized by GCC and assess a \$200 price reduction for this item.

GCC’s \$1,352 quote for the material costs for Item 10E. lends credence to the Government’s \$1,645 IFB estimate for this work. However, the VA provided no detail to corroborate its IFB estimate for this item. The 12 hours of labor necessary to install the 23 accessory items appears excessive; we will allow 8 hours labor for this work. This results in a \$1,547 price reduction for this item.

The value GCC attributes for installation of handrails, wall guards and corner guards in its claim (Item 10G.) is consistent with the VA’s material and labor for the wall guards and corner guards estimate. It appears that GCC did not include the handrail installation in its estimate. We will allow a Contract price reduction of \$7,300 for this item, which represents the IFB estimate reduced by 15%.

Item 12A., the entrance grid mat, is simply a material item. We will reduce the Contract price by the \$800 acknowledged by GCC for this item.

Neither party provided clear evidence of exactly what the Contract required for the secure dispensing window unit (Item 12C.) in Clinic pharmacy. GCC has provided a quote of \$2,814 for a unit that appears to meet Contract requirements and the VA IFB estimate of \$445 for installation labor appears reasonable. Reducing the installation labor by 15% and adding that amount to the GCC material quote results in a Contract price reduction of \$3,192 for this item.

There is no evidence in the record supporting the extent of the efforts of VA personnel to relocate the sanitary clean-out. Moreover, the VA's valuation of Item 15C. is so minor that it leads to the conclusion that this work was in the nature of maintenance. We will not reduce the Contract price for this item.

The VA IFB estimate for the exhaust fan speed controls item was \$1,197; GCC did not provide any pricing information for this item. We will allow a Contract price reduction for this item of \$1,017, a 15% reduction of the IFB estimate.

The VA, for the completion IFB, estimated a cost of \$220 to connect electrical power to exhaust fan EF-8. Reducing this amount by 15% we will allow \$187 for this punch list Item 15E.

The VA estimated that completion, final adjustment and acceptance of the sprinkler system would require a \$1,302 effort. This estimate includes an assessment of \$36 for signage and 24 hours of labor at \$30.60. In addition, there is a lump sum amount of \$500 assessed with no indication as to the reason for the \$500. In the absence of evidence supporting the signage or the lump sum assessments, we will allow a Contract price reduction \$735 for completion and adjustment of the fire sprinkler system.

The IFB estimate for the final completion, testing and start-up of the boiler was \$1,454; GCC acknowledged a \$300 cost for this effort. However, the GCC amount apparently includes only the start-up effort. Applying the 15% formula to the IFB estimate, we will allow \$1,236 for punch list Item 15H.

GCC does not contest that it was required to provide maintenance and operating instructions for the major systems it installed and it sets its cost to provide this instruction as \$1,100. We find no evidence supporting the VA's CCO #3 amount of \$1,800 for this instruction. We will allow an \$1,100 Contract price reduction for punch list Items 15S., T., V. and 16H.

The VA, in the IFB estimate, assigned a value of \$768 for completion and corrections of the fire alarm system (Item 16D.); GCC valued this effort at \$500. These relatively minor amounts to complete the system support a conclusion that GCC's assertion that the fire alarm system was 99% complete was correct. In view of this, we accept GCC's valuation of \$500 as a credible amount and reduce the Contract price by that amount for Item 16D.

We will reduce the \$800 IFB estimate for the final hook-up of the motion intrusion system (Item 16E.) by 15% and allow a price reduction of \$680 for this item.

The VA apparently used in-house resources to remove temporary electrical circuits installed by GCC during construction. Mr. Litvin, drawing on his "experience" valued this effort at \$500. The VA has failed to prove the quantum for this item, particularly since the evidence of the actual effort expended by VA should be readily available. We will not reduce the Contract price for Item 16F.

The IFB estimate for the labeling of the electrical equipment and panel board was \$1,103; GCC represented the extent of the effort required for this work at \$300. The VA estimate is based on 32 hours of labor and \$40 worth of material to perform this task. It is logical that it would take someone other than the installer longer to trace and label the circuits. However, the price reduction to which the VA is entitled is the price for GCC to perform the work and the VA has provided no evidence, other than Mr. Litvin's subjective evaluation, that it will take an electrician 32 hours to perform this work. We again use the 15% IFB estimate reduction factor, on a jury verdict basis, to reach a Contract price reduction of \$800 for Item 16G., \$773 for labor and \$27 for materials.

We will allow a Contract price reduction of 15% of Mr. Litvin's CCO #3 estimate (\$340) for Item 16J, the fire alarm system spare parts not provided by GCC.

In summary, we will allow a Contract price reduction of \$37,452 for Contract work remaining incomplete. Under the Contract terms, credit changes are priced using the direct costs and negotiated overhead and profit rates. Neither party provides any evidence supporting the overhead or profit rate to be applied to the direct costs. In the absence of such evidence, we will use the overhead and profit rates established for equitable adjustments in the Contract CHANGES provisions. Using those rates produces a Contract price reduction of \$44,318 for work left incomplete by GCC. The VA paid GCC \$15,356 of the CCO #3 punch list price reduction for work completed after issuance of CCO #3. This leaves a Contract price reduction balance of \$76,744 retained by VA. The difference between the price of the punch list work allowed here and the \$76,744 balance of the CCO #3 price reduction entitles GCC to payment of \$32,426.

DECISION

For the forgoing reasons, the Appeals of Gladwynne Construction Company, VABCA-6594 and 6598 under Contract No. V512(B)-012, are **SUSTAINED**; the Appeals in VABCA-6595, and 6597 are **DENIED**. Appellant, Gladwynne Construction Company, is entitled to a judgment of \$34,364 plus interest under the *CONTRACT DISPUTES ACT* from September 19, 2000, the date the Contracting Officer received the claim.

DATE: **April 19, 2002**

RICHARD W. KREMPASKY
Administrative Judge
Panel Chairman

We Concur:

GUY H. MCMICHAEL III
Chief Administrative Judge

PATRICIA J. SHERIDAN
Administrative Judge